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No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MORRISON-KNUDSEN CONSTRUCTION COMPANY,
and
ARGONAUT INSURANCE COMPANY,
Petitioners,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. RESPONDENT HILYER'S BRIEF FAILS TO DEAL WITH TWO OF PETITIONERS' MAIN ARGUMENTS: THE DEVASTATING PRACTICAL IMPACT OF THE DECISION BELOW, AND THE LEGISLATIVE HISTORY IN THE LIGHT OF THE *Pepco* Rule

The issue in this case is whether employer contributions to union trust funds are included in employee "wages" within the meaning of the LHWCA. The parties are agreed that this issue is solely a matter of congressional intent. But the remarkable thing about respondent Hilyer's brief is that it completely fails to consider two of

petitioners' principal guides to that intent: the purposes the statute was intended to serve, and the legislative history. It expressly refuses to discuss one, and it attempts no real answer to the other.

A. The Practical Consequences of the Decision Below in Undermining the Statute's Purposes

Among the practical effects of the decision below demonstrated in petitioners' brief are that longshoremen's benefits would rise above wages (Pet. Br. at 42-43),[1] compensation premiums would rise above payroll (Pet. Br. at 36-44), and swift, efficient delivery of benefits would become impossible. Pet. Br. at 46-48. In the *amicus curiae* briefs, the practical consequences argument is the dominant theme: on the shipbuilding industry, "catastrophic" (Ship. Br. at iv) and as to administration, "chaotic" and "virtually impossible" (*id.* at 8); on the stevedoring industry, "disastrous," with "employers * * * forced into bankruptcy" (Steve. Br. at 11); on self-insurers' members, "intolerable hardship" (Self-Insurer's Br. at 25); on insurers and the economy, "distastrous." AIA Br. at 1. Respondent has offered three reasons for refusing to deal with these consequences.

Respondent's first contention is that these consequences are "judicially irrelevant." Hilyer Br. at 8. But far from being irrelevant, judicial consideration of the practical effects of a statutory interpretation is a wholly legitimate, commonly used tool of statutory analysis, applied to the LHWCA and other statutes alike. This Court has repeatedly declared that it must take cognizance of how a particular interpretation will be applied in other cases, and that it considers pertinent whether the practical

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[1] Throughout this Reply Brief we use the same abbreviations as in our Opening Brief, as well as the following: "Hilyer Br." (Brief of Respondent Hilyer); "U.S. Br." (Brief for the Federal Respondent on the Merits); "Pet. Br." (Petitioners' Opening Brief); "Self-Insurers' Br." (Brief of *Amicus Curiae* National Council of Self-Insurers on the Merits in Support of Petitioners).

consequences of a particular construction will advance or undermine a statute's purposes.[2]

To be sure, this Court has also sometimes held that, when statutory language is so clear as to be absolutely inescapable, unpleasant effects such as added costs are not enough to overcome the necessity for respecting that clear language. But the present case is about as far from that situation as it would be possible to get. If the Longshoremen's Act meaning of "wages" urged by respondent is as plain as she contends, how could it have happened that this meaning eluded the tens of thousands of judges, administrators, lawyers, employers, and claimants who have disposed of millions of cases over the past fifty-five years on the basis of a flatly opposite meaning?[3] More-

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[2] *See, e.g., Pillsbury Co.* v. *Conboy*, 51 U.S.L.W. 4061, 4063-65 (U.S. Jan. 11, 1983); *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 85-86 (1980); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 268-271 (1979); *Andrus* v. *Charleston Stone Products Co.*, 436 U.S. 604, 614-616 (1978); *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978); *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 110-111 (1944).

[3] One may well ask how respondent could achieve this upside-down view of the "plain meaning" of the statute. One device is to change the words of the statute. The definition begins, " 'Wages' means the money rate at which the service rendered is recompensed * * *." Obviously the operative word here is "money rate," which is the number of dollars and cents per hour or month or year received by the employee — and it is on this figure that the vast bulk of cases are now disposed of without controversy. Equally obvious, "money rate" cannot by any amount of stretching include employer contributions into union trust funds. To avoid this difficulty, respondent reaches for the verb "recompense," and then proceeds to argue that "recompense" is broad enough to include these contributions. Hilyer Br. at iii, 10, 20, 21, 26. The word "recompense" is the word chosen in the very heading for respondent's Argument I on plain language, and is the last word in that section. But "recompensed" is only a neutral verb in the definition—it could just as well have been "compensated" (which has the same root), or "paid," or "remunerated," or any number of other synonyms. Respondent rewrites the definition to say, in effect,

over, the consequence here is not merely an unwelcome added cost, but the frustration of the Act itself, by putting a premium on remaining away from work; by sabotaging one of the prime purposes of the Act — rehabilitation; by making compensation uninsurable; and by substituting uncertainty, long delay, and litigation for prompt delivery of benefits.

Respondent's second reason for refusing to discuss "practical consequences" appears to be the notion that the plans on which petitioners' calculations of impact are based are not comparable to the plans here involved, but are "a virtually unlimited variety of non-contract fringe benefits and the like * * *." Hilyer Br. at 8. Of course, no two health and welfare "packages" are identical, but the Atlantic and Gulf agreement used as an example (Pet.

"'wages' means the recompense. . . ." Having achieved this, respondent then apparently feels no need to rely on the second half of the definition, "board, rent, housing, lodging or similar advantage received from the employer . . . ." Indeed, respondent almost seems to chide petitioners for even discussing this second "nonmonetary portion" of the definition. Hilyer Br. at 19.

The other textual revision undertaken by respondent is to change the words "received from," in the excerpt just quoted, to "paid by the employer." Hilyer Br. at 6. Indeed, at one point respondent changes "received" to "paid" in the space of five lines. Hilyer Br. at 10. This is not an inconsequential change. What a beneficiary received from a union trust fund is "received from" the trust fund. The fact that ultimately the fund has been created by employer contributions does not change this, since what the employee receives often bears little or no relation to those contributions. Hilyer himself, for example, had acquired no pension rights, because of the brevity of his employment, while employees with five years' seniority get pension credits for years in which no contributions had been made based on their wages. JA at 50-51; U.S. Br. at 12.

Note, moreover, that when Congress wanted to make an exception in the definition of "wages" to the "received-from-the-employer" rule, as it did in order to cover tips, it did so by adding an express provision at the end of the definition. It is a fair implication, then, that this is the only exception Congress intended to carve out of the "received-from-the-employer" requirement.

Br. at 42-43), like the funds here involved, is basically a "pension and welfare" fund, and is so referred to by the Stevedores (Steve. Br. at 11), and in the agreement itself. JA 38. Note also that the Health and Welfare Fund in the instant case was extremely inclusive. It covered:

> "medical, dental, and/or hospital care, compensation for injuries, and/or illness resulting from occupational activity, * * * unemployment benefits, * * * purchase of insurance covering life and accidental death, accident disability benefits, hospitalization, surgical, medical and sickness benefits, * * * or any other type of health and welfare benefits * * * in the discretion of the trustees * * *." [JA 38.]

For good measure, the present package included a "training fund,"[4] going beyond most of the longshoremen's plans used in our comparisons.

Thus, the *additional* types of fringe benefits cited by petitioners as being potentially included (Pet. Br. at 44) were not involved in, and are not necessary to, petitioners' demonstration of the devastating impact of the decision below. But they are still intensely relevant. The reason is that if the erroneous formula of the court below stands — "*all* of the identifiable value, in whatever form

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[4] The training fund was not, however, as broad in coverage as Hilyer's brief seems to contend. Notwithstanding her admission that the training fund "did not in words specify that it was earmarked for the families of members" (Hilyer Br. at 3; *see* JA 40), Mrs. Hilyer appears to argue that the fund was in fact so designed, and hence that she must now purchase training that she otherwise would have obtained from the fund. Hilyer Br. at 27. This is simply not so. The explicit terms of the collective bargaining agreement state that the training fund was designed to ensure that adequate, trained manpower would be available for the construction work to be performed under the agreement's terms; the training fund guaranteed workers' families no benefits whatsoever. In fact, the fund is best viewed as an employer's investment in his entire workforce, rather than in individual employees, with contributions measured on a per-employee basis for convenience. *See* U.S. Br. at 13 n.10.

it may appear" (Pet. App. 13a; emphasis in original)—attempts will certainly be made to add these fringe items and others to wage calculations, severely complicating and delaying the benefit process. Moreover, if that formula is applied literally, most of them might eventually have to be actually included, thus exacerbating the already damaging effect of the decision.

Finally, Hilyer incorrectly suggests that this Court should ignore the practical effects of the decision below simply because direct factual evidence of those effects was not introduced at the original administrative hearing. But neither Hilyer nor anyone else has challenged our contention that the decision below will sabotage the Act's purposes; nor has Hilyer or anyone else challenged the accuracy of the matters that we, the United States, and *amici* have referenced.[5] These matters are in the public record and all are the type the Court has regularly taken note of and relied upon in other cases.[6]

B. Legislative History in the Light of the *Pepco* Rule

The "*Pepco* rule" may be summarized as follows: when Congress takes over intact a provision from a state act and enacts it into federal law, and when *at that time* the

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[5] Those in the best position to challenge petitioners' and *amici*'s representations have not come forward to do so. Although the Metropolitan Washington Council, AFL-CIO, filed a brief in opposition to the petition, it has filed no brief in support of Hilyer on the merits. It is also noteworthy that neither the International Longshoremen's Association nor any other longshoremen's association or union has filed an *amicus* brief in support of respondent.

[6] *See, e.g., Memphis Bank & Trust Co.* v. *Garner*, 51 U.S.L.W. 4104, 4105 n.8 (U.S. Jan. 24, 1983) (figures in United States *amicus* brief); *Bowen* v. *United States Postal Service*, 51 U.S.L.W. 4051, 4057 n.4 (U.S. Jan. 11, 1983) (White, J., concurring and dissenting) (administrative agency's statistics). *See also Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 246-47 (1978) (retroactive non-funded liability for pension plans "jeopardizes the insurer's solvency and, ultimately, the insureds' benefits"); *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 721-723 (1978) (same).

provision had a clearly-accepted meaning, Congress must be deemed to have intended that meaning. *Potomac Electric Power Co.* v. *Director*, 449 U.S. 268, 280 (1980); Pet. Br. at 16-17 & n.14.

Although this principle is said in petitioners' brief to control this case (Pet. Br. at 16), Hilyer's brief makes no attempt to deal with it. Having noted that petitioners argue that the *Pepco* case compels a denial of Hilyer's claim, the Hilyer brief simply states: "The conclusion is in error." Hilyer Br. at 19. There follows a sentence that merely summarizes the case's holding, and then the brief moves on to other matters.

At another point in the brief, Hilyer announces her own rule of interpretation, which is the exact opposite of the *Pepco* rule. Hilyer contends that, in construing the meaning of "wages" in the LHWCA, "[o]ne can either read the words in their originally enacted connotation, *or preferably in the light of their later development.*" Hilyer Br. at 13; emphasis supplied. Then, after noting that in recent years the term "wages" has in some contexts come to include benefits such as employer trust-fund contributions, Hilyer contends that "[t]he definition of 'wages' now found in * * * the LHWCA * * * is flexible enough to incorporate * * * advances in industrial wage practices." *Id.* at 32. This approach is completely at odds with this Court's settled principles of statutory construction.

It is well established that "a statute 'is not an empty vessel into which the Supreme Court is free to pour a vintage that [the Court] think[s] better suits present-day tastes.'" *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 827 (1978) (quoting *United States* v. *Sisson*, 399 U.S. 267, 297 (1970)). Rather, as this Court has repeatedly held, words of a statute are to be "interpreted as taking their ordinary, contemporary, common meaning * * * *at the time Congress enacted the*

statute * * *." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (emphasis supplied); *accord*, *Pepco*, 449 U.S. at 280 ("Our task is to ascertain the congressional intent underlying the schedule benefit provisions enacted in 1927 [the year the LHWCA was adopted]; we are not free to incorporate into those provisions subsequent * * * developments that we may consider sound as a matter of policy").[7] Hence, Hilyer's reliance on recent developments in "industrial wage practices" (*see* Hilyer Br. at 12-20; 32) cannot retroactively give meaning to the term "wages" as it was adopted by Congress in 1927. This is particularly true when Congress adopted verbatim the language of a state act which had at the time a universally accepted meaning.

While Hilyer argues (Hilyer Br. at 20) that "Congressional intent shows that fund interests should be included in LHWCA 'wages,'" her entire argument concerning the congressional intent behind *this* statute is premised upon the congressional intent behind *other* statutes. *Hilyer has not cited one syllable in the legislative history of the LHWCA to support her interpretation.*

Thus, Hilyer relies heavily (Hilyer Br. at 15, 16, 28) upon two circuit court decisions[8] interpreting the term "wages" in the federal labor laws as support for her interpretation of that term in the LHWCA. But this Court has already twice rejected the application of those decisions to other statutes. *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 33 (1959) ("Nor do we believe that holdings that various fringe benefits are

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[7] *Cf. Director* v. *Perini North River Ass'n*, 51 U.S.L.W. 4074, 4079 (U.S. Jan. 11, 1983) (construction of the LHWCA must take into account "the context in which the [1927 Act was] passed").

[8] *Inland Steel Co.* v. *NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied on this issue*, 336 U.S. 960 (1949), *aff'd on other grounds sub nom. Steelworkers* v. *NLRB*, 339 U.S. 382 (1950); *W.W. Cross & Co.* v. *NLRB*, 174 F.2d 875 (1st Cir. 1949).

wages under the N.L.R.A. or the Social Security Act are apposite. We construe the priority section of the Bankruptcy Act, not those statutes") (distinguishing *Inland Steel*); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 592-593 n.16 (1977) ("Even if pensions are 'wages' for the purposes of the NLRA, that classification would not control their treatment under the very different statute at issue in this case") (citing *Embassy Restaurant* and distinguishing *Inland Steel*).

Similarly, Hilyer argues that Congress' amendment of the Davis-Bacon Act in 1964 and its enactment of certain other statutes concerning employee trust plans should be treated as evidence of a parallel congressional intent to amend the LHWCA. This is an extraordinary contention. It asks this Court to up-end the established principle that Congress knows how to legislate with particularity (*see, e.g., American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 510-512 (1981)), and hold, instead, that to amend one statute is to amend them all. Moreover, Hilyer's argument ignores one enormous difference between Davis-Bacon and the LHWCA which affects the calculation of benefits under the two quite different statutes: under Davis-Bacon, a collective wage level is fixed for an entire area; but under the LHWCA, an individual wage must be calculated for *each* of the millions of workers who will file compensation claims. Congress should surely not be thought to have imposed such a significant new LHWCA administrative burden, sub silentio, through its enactment of Davis-Bacon.

We urge the Court to reject the view that congressional intent concerning the LHWCA can be determined on the basis of the background and legislative history of other statutes. Instead, if the Court bases its determination on the legislative history that matters—that of the LHWCA itself—it will conclude that Congress never intended or even contemplated the inclusion of trust-fund benefits in LHWCA "wages." *See* Pet. Br. at 19-31.

II. THE STATE CASES CITED BY RESPONDENT ARE IRRELEVANT TO THE LHWCA AND, IN ANY EVENT, DO NOT SUPPORT RESPONDENT'S POSITION

As support for her construction of the word "wages" in the LHWCA, respondent has cited several state decisions interpreting other statutes. Hilyer Br. at 15, 17-18. However, as this Court has already ruled, the term "wages" in the LHWCA must be construed in light of the specific purpose and legislative history of the LHWCA itself. *See Pepco*, 449 U.S. at 280. Respondent's reliance upon state court decisions interpreting various state statutes is therefore misplaced. Moreover, Hilyer has in any event misconstrued those state court decisions.

Most of the state cases cited by Hilyer did not even deal with the definition of "wages" in a state workers' compensation act. Thus, in *Electrical Workers* v. *IBEW-NECA Holiday Trust Fund*, 583 S.W.2d 154 (Mo. 1979), the issue was whether, under the terms of a particular collective bargaining agreement, interests in a vacation pay trust fund were subject to garnishment. 583 S.W.2d at 157. (Petitioners have already noted that vacation pay is a legitimate inclusion in LHWCA "wages," *see* Pet. Br. at 8 n.6.) The issue in *LaPuzza* v. *Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 217 N.W.2d 472 (1974) was whether a contractor's payments for social security, unemployment insurance, health and welfare insurance, and pension funds were part of "the cost of all labor, materials, and equipment * * *" for which he was entitled to be repaid under a construction contract. 217 N.W.2d at 475. In *Genix Supply Co.* v. *Board of Trustees of Health & Ins. Fund*, 84 Nev. 246, 438 P.2d 816 (1968), the court held that a contractor was liable under its surety bonds for amounts it had failed to contribute to employee pension, health, and welfare plans, under a state statute giving priority in such circumstances to a recovery for wages. 438 P.2d at 816-817. The court noted that this Court had ruled to the contrary in *Embassy*

Restaurant, but declined to apply that decision to the state law at issue. *Id.* at 817.

Equally inapplicable is the decision in *People* v. *Alves*, 155 Cal. App. 2d Supp. 870, 320 P.2d 623 (1957). In that case, a criminal prosecution, the issue was whether an employer could be imprisoned for failing to make required contributions to employee health and welfare funds. 320 P.2d at 624. In concluding that these contributions were "wages" under the state labor code, the court relied upon a state statute defining "wages" as "*all* amounts for labor performed by employees of *every* description * * *." *Id.* at 624-625; emphasis added. *Foremost Dairies* v. *Industrial Accident Comm'n*, 237 Cal. App. 2d Supp. 560, 47 Cal. Rptr. 173 (1965) simply relied upon *Alves* (47 Cal. Rptr. at 186-187) to hold an employer liable under an employment agreement for certain employee medical expenses.

The statute at issue in *Trustees of Colorado Corp.* v. *Pinkard Constr. Co.*, 199 Colo. 35, 604 P.2d 683 (1979) made subcontractors liable for "amounts lawfully due" workmen. 604 P.2d at 684. Relying upon this Court's decision in *United States ex rel. Sherman* v. *Carter*, 353 U.S. 210 (1957), the court held that an employer's pension plan contributions were covered by the statute. 604 P.2d at 684. Finally, the New York Court of Appeals in *People* v. *Vetri*, 309 N.Y. 401, 131 N.E.2d 568 (1955) ruled that an employee's vacation pay was *not* part of his "wages" under a state law requiring prompt payment of wages to employees. 131 N.E.2d at 570-572.

The *only decision* cited by Hilyer holding that an employer's trust fund contributions were "wages" for the purpose of determining workers' compensation is *Hite* v. *Evart Products Co.*, 34 Mich. App. 247, 191 N.W.2d 136 (1971). But even that decision is of questionable value, since, prior to the *Hite* court's decision, the state legisla-

ture adopted a provision specifically excluding fringe benefits from a compensation award. 191 N.W.2d at 138 n.2. Indeed, subsequent to the *Hite* decision, the Arizona Court of Appeals in *Still* v. *Industrial Comm'n*, 27 Ariz. App. 142, 551 P.2d 591 (1976) expressly refused to follow *Hite* for that very reason ("*no jurisdiction* now authorizes what Still seeks this Court to provide"), and because the logic of *Hite* would require "social security contributions, unemployment compensation premiums, and maybe even workmen's compensation premiums" also to be added. 551 P.2d at 593-594; emphasis supplied.

Thus, the most that can be said for these state cases is that, based upon different state law provisions—none of which even resembled the LHWCA definition of "wages" —different state courts reached different results concerning the inclusion of trust fund contributions in benefits due employees. Only one decision (*Hite*) even addressed "wages" in a workers' compensation context, and it is plainly lacking in precedential value. Therefore, in this case there is not even the "recent trend" which this Court considered and rejected in *Pepco*, 449 U.S. at 279-280. Accordingly, the state court decisions cited by Hilyer are inapposite to this case.

CONCLUSION

For the foregoing reasons and the reasons stated in petitioners' opening brief, the judgment of the United States Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

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